87

Supreme Court, U.S.

07-11[illegible] 2008

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LANCE MUSSSELMAN, an engine oiler and a single man; BOB NEWMON, an engine oiler and a single man,

Petitioners,

v.

MARK NITCHMAN, Director of Maintenance of Washington State Ferries; CARL ALLEN, Staff Chief of Washington State Ferries; BEN BROXON, Staff Chief of Washington State Ferries,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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4. Is the Fourteenth Amendment's requirement of an unbiased decision maker offended under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) where whistleblowers showed the decision maker was responsible for the budgeting and accounting of a program alleged to be a pay padding scheme, and should decision maker bias for whistleblowers be clarified under *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) and *Tumey v. Ohio*, 273 U.S. 510 (1927) to include managers of programs that involve the misuse of public funds?

5. Is a question of material fact created under a summary judgment motion for a First Amendment claim when a new supervisor who is involved in a program the whistleblower is criticizing discusses firing the whistleblower upon his arrival at his new assignment and then subsequently sends his assistant to gather information on the whistleblower and the assistant repeats the supervisor's statements that he intends to fire the whistleblower?

6. Does the Ninth Circuit's affirming of the district court conflict with the Washington State Supreme Court's interpretation of the minimum evidence necessary to show a person is a whistleblower under the Washington Law Against Discrimination as it relates to whistleblowers?

PARTIES TO THE PROCEEDING

Lance Musselman was an oiler of the Washington State Ferries whose employment was terminated.

Bob Newmon is an oiler of the Washington State Ferries.

Mark Nitchman was the Director of Maintenance of the Washington State Ferries when this case was filed. He assumed a union position after this case was filed and is currently a staff chief of the Washington State Ferries.

Carl Allen was a staff chief of the Washington State Ferries when this case was filed. He retired after this case was filed.

Ben Broxon is a staff chief of the Washington State Ferries.

Michael Thorne was the CEO of the Washington State Ferries when this case was filed. After this case was filed, Mr. Thorne resigned his position and he was dismissed by the district court. The dismissal was not appealed and he is not a party to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Lance Musselman and Bob Newmon respectfully pray that a Writ of Certiorari issue to review the decision of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued its opinion in this case on November 2, 2007. A copy of the unpublished memorandum opinion is attached as Appendix A. The Court of Appeals issued an order denying rehearing and rehearing en banc on December 11, 1007. This order is attached as Appendix B. One claim of Petitioner Newmon was remanded and on December 20, 2007, the Court of Appeals issued an order staying the remand pending a decision on this petition for a writ of certiorari. A copy of this order is attached as Appendix C.

JURISDICTION

The Ninth Circuit Court of Appeals affirmed in part and reversed and remanded in part the decision of the District Court on November 2, 2007. A motion for rehearing or rehearing en banc was denied on December 11, 1007. This court has jurisdiction under 28 U.S.C. §§ 2101(c) and 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are listed in Appendix K.

STATEMENT OF THE CASE

Petitioners Lance Musselman and Bob Newmon were oilers working for the Washington State Ferries in 2002 who complained about widespread pay padding among the management. Musselman had worked for the Washington State Ferries for 20 years and had received letters of commendation for saving ferries by putting out fires during a grounding, a fire onboard a ferry, and a fire on a dock. Musselman criticized the pay padding scheme known as the Special Projects for many years. Musselman complained about the widespread waste of funds and mismanagement to the management, co-workers, to a local newspaper, and at union meetings. The senior management of the ferries involved in Special Projects were at the union meetings because they were also active senior members of the union. Musselman increased his criticism in the 2001-2002 timeframe because the pay padding was increasing while the ferry service was being cut back, from cutting the number of ferry runs, to cutting food service, to completely cutting passenger-only ferry service.

Financial documents from Allen and Broxon obtained under a discovery order from the district court indicated Allen was padding his pay by $20,000 to $54,000 per year during this timeframe. Broxon was padding his pay approximately $20,000 per year. The financial documents produced under the order indicated they had been "revised and reissued" suggesting these numbers may have been higher.

In 2002, Nitchman sent Allen to the ferry Musselman was working on. When Allen arrived, he asked the staff chief he was relieving, Stell, whether he had "fired" Musselman yet. Allen then harassed Musselman. Allen's assistant Mullens then came to Mussselman and while trying to gather information from Musselman for Allen, told Musselman Allen stated he wanted to fire him because he was criticizing the Special Projects. While walking off the dock one day after watch, Musselman told Hare that he wanted the harassment to stop. Hare communicated this to Allen and Nitchman and Musselman was brought up on charges by Nitchman for threatening Hare which Musselman denies.

At Musselman's *Loudermill* hearing, Nitchman began the hearing on his own initiative with a statement that a newspaper reporter had interviewed him about the Special Projects. The timing and content of Nitchman's speech made it absolutely clear Nitchman was retaliating against Musselman because Musselman was criticizing the Special Projects pay padding scheme. Discovery later showed Nitchman was the kingpin of the whole scheme which he had taken over approximately 8 years earlier from the previous Director of Maintenance who had previously run the scheme. Documents showed Nitchman himself had assigned both Allen and Broxon to do their Special Projects.

After Musselman's *Loudermill* hearing, Musselman was terminated. Musselman's union refused to represent him because the senior management involved in the Special Projects were also the senior members of Musselman's union. The

union representative then contacted Musselman and stated that he should not listen to his attorney because the senior union members thought Musselman's attorney was an investigator working for the state and investigating the Special Projects. The state Marine Employees' Commission then contacted Musselman through his attorney and stated that they would only hear a post-termination complaint if Musselman agreed not to talk about the senior members of the union who were also senior members of the management involved in the Special Projects. The commission offered no guarantees for giving up the right to talk about what actually happened.

Musselman then filed a federal civil action. Musselman's case was tried by a jury. In the last few minutes of trial, Nitchman through the Washington State Attorney General's Office introduced a document that was withheld up to that point and contained allegations of new threats, medical opinions, and an opinion from a doctor who does not exist. Musselman's attorney objected that Musselman was seeing the document for the first time at the end of the trial, it contained highly prejudicial statements, and it was unclear who was making the statements in the withheld document. The district court admitted the document under the business record exception to the hearsay rule. The jury found that Nichman violated Musselman's First Amendment rights but decided Nitchman had other reasons to discipline Musselman.

Petitioner Bob Newmon had been at the Washington State Ferries for approximately two

years in 2002, and he was previously an oiler at NOAA. Newmon was working on a ferry with Broxon. As an oiler, Newmon had a lot of experience with oils and he heard about a project in which Broxon was supposedly researching oils for the ferries. Newmon asked questions about the study and asked where the study was being conducted. Newmon was told the study was being conducted on Newmon's ferry, which Newmon knew was not the case. Broxon learned of Newmon's questions and one night told Newmon they would be working in a small tool room together. Once in the tool room, Broxon confronted Newmon and told him that he should not talk about the Special Projects and that things can happen to people, things can happen to their family, and their house can burn down. Broxon then made a similar threat regarding Newmon's friend Floyd McLaughlin, who was also criticizing the Special Projects pay padding. Newmon became upset at being threatened and requested to be relieved for the night by the ferries dispatcher. Broxon and Nitchman then brought charges against Newmon for leaving his post and for being disrespectful to his supervisor Broxon, the person who threatened him.

The charges against Newmon were initially heard by a member of the management not involved in the Special Projects and he recommended dismissal of the charges. Newmon – who did not know Nitchman was the kingpin at that time - then asked Nitchman if Broxon had been brought up on any charges. In response, Nitchman ordered that a new *Loudermill* hearing be scheduled for the claims against Newmon. Nitchman led the new hearing and when Newmon brought up Special Projects at the

hearing, the hearing departed from a controlled environment and Nitchman jumped across the table and began screaming in Newmon's face. It was recommended that Nitchman seek counsel from the Washington State Attorney General's Office and after a break, Nitchman ended the hearing. Through correspondence, Nitchman found that Newmon had committed the charges, suspended him for two weeks without pay, and put an adverse letter in his file.

At the Ninth Circuit, Musselman filed the Brief of Appellants. Nitchman filed a Brief of Respondents and did not respond to many of the Musselmans' arguments in the Brief of Appellants. After Musselman and Newmon filed their Reply Brief, Nitchman filed a motion to strike the Brief of Appellants based on a claim that the district court struck the citations noted in the facts section, but Nitchmans' claim is in error and the district court did not strike the parts of the declarations cited. Musselman responded to the motion and noted that Nitchman made a mistake and misread the district court order, very few facts were struck by the district court, and those important to the appeal were appealed.

The Ninth Circuit affirmed the district court as to Musselman's claims and stated there was other evidence warranting dismissal and therefore the admission of the challenged exhibit was harmless. The Ninth Circuit overlooked the fact that only one witness heard Musselman's statement, and Musselman denies the allegation. Nitchman also stated he had Musselman sign a last chance agreement based on an alleged previous event in

which Musselman was alleged to have committed telephone harassment against a ferry manager. Nitchman presented a document at trial, but on cross-examination, it became clear that Nitchman had been in contact with the manager prior to any calls, Nitchman ordered Musselman to call the manager, and the manager then reported Musselman for telephone harassment. The manager then claimed additional pay for researching and managing the issue. These actions were consistent with Musselman's claim of widespread pay padding and retaliation against whistleblowers by the managers at the Washington State Ferries. This left only the new allegations in Exhibit 141, the document withheld until the last few minutes of trial.

On Newmon's claims, the Ninth Circuit reversed and remanded his outrage claim brought under state law. Newmon joins his fellow whistleblower Musselman in this writ because it is clear Nitchman was a biased decision maker in Newmon's second *Loudermill* hearing and this violated his Fourteenth Amendment rights.

REASONS SUPPORTING WRIT

1. Certiorari should be granted to determine the applicability of the Work Product Doctrine under *Hickman v. Taylor*, 329 U.S. 495 (1947) when highly prejudicial documents are withheld from discovery under the doctrine but then introduced in the last few minutes of trial.

Petitioners ask this Court to adopt the Florida State Supreme Court's interpretation of this Court's Work Product Rule in *Hickman v. Taylor* and the duties of producing documents if they are intended to be used at trial, regardless of whether opposing counsel considers the documents work product prior to use at trial. *Northup v. Acken*, 865 So.2d 1267,1269 (Fla. 2004)(quoting and interpreting *Hickman v. Taylor*, 329 U.S. 495 (1947)). This will clarify the Work Product Doctrine, prevent confusion, and prevent attorneys from believing they can withhold documents under the doctrine until the last few minutes of trial, then surprise the opposing party with the documents.

In *Hickman v. Taylor*, this Court recognized the need for a work product privilege to allow an attorney to be free to prepare a case without undue and needless interference. *Hickman*, 329 U.S at 510. This Court did recognize an exception, where there are "adequate reasons" to justify production. Id. at 512. In the present case this exception was not available, because the state's attorneys held the only known copy of the document and they did not

disclose its existence until the last few minutes of trial when it was introduced as an exhibit.

The first issue is whether the document is work product. The Washington State Attorney General's Office had the only known copy of the document and Nitchman claims he does not know who wrote the document. It appears Nitchman's attorneys gathered the document from the state ferries after Musselman filed his civil action. The Florida Supreme Court stated the following in *Northup*:

> "What constitutes "work product" is incapable of concise definition adequate for all occasions. Generally, those documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery. ..." *Northup*, 865 So.2d at 1270 (quoting *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108,112 (Fla. 1970)).

If the document was not work product then Nitchman's attorneys were required to disclose the existence and provide a copy of the document during discovery. If the document was work product, then the proposed use at trial required that the document be identified and provided during discovery:

> "when a party reasonably expects or intends to utilize an item before the court at trial, for impeachment or otherwise, the video recording, document, exhibit, or other piece of evidence is fully discoverable and is not

> privileged work product. In essence, Florida litigants must make a simple and discrete decision prior to entry of a pretrial case management order by the trial court. An attorney must evaluate whether he or she intends to use evidence in his or her possession for strategy and trial preparation purposes only, which would qualify the selection of the particular items as a protected product of the thought processes and mental impressions of an attorney. On the other hand, if the evidence or material is reasonably expected or intended to be disclosed to the court or jury at trial, it must be identified, disclosed, and copies provided to the adverse party in accordance with the trial court's order and the discovery requests of the opposing party." *Northup*, 865 So.2d at 1270.

The Ninth Circuit affirmed the lower court on all issues except Newmon's outrage claim, which was reversed and remanded. The Ninth Circuit did not hear the merits of the Musselman's claims because the Nitchman filed a motion to strike portions of the Brief of Appellants. Musselman responded to the motion stating the motion was based on an incorrect statement of the district court's order and the district court did not strike the copy of the Musselman declaration attached to the Hart declaration.

In a footnote, the Ninth Circuit ruled that Exhibits 141 and 142 did not prejudice Musselman's case because of overwhelming evidence. Here only one person who claims he heard Mr. Musselman's alleged threat and Mr. Musselman denies

threatening Hare and instead he requested that the harassment he was receiving for complaining about special projects stop.

The alleged previous incident testified to by Nitchman was shown to be set up by Nitchman, since he first communicated with Tjemsland, ordered Musselman to call Tjemsland, Musselman called Tjemsland, and Tjemsland then reported Musselman for telephone harassment. The District Court specifically noted this revelation in one of the orders. This left only the new documents withheld from discovery and submitted in the last few minutes of trial as the only corroborating evidence. The document withheld until the last few minutes of trial, Exhibit 141, contains a new false allegation of a threat as well as many untrue allegations such as a statement that Musselman was making telephone calls to his dog. Nitchman claims he does not know who wrote the statements.

The attorneys for Nitchman, the Washington State Attorney General's Office, went far beyond using the Work Product Privilege as a shield and instead used it as a sword to withhold the documents from discovery and then waited until the last few minutes of a ten day trial to reverse their position and introduce the documents and surprise Musselman. Musselman could not confirm the contents of the document in the last couple minutes of trial – which later investigation proved contained opinions from a doctor who does not exist. The document also contained a new alleged threat (and the alleged reason for Musselman's dismissal was a threat). The jury found that Nitchman violated

Musselman's First Amendment rights, but found that Nitchman had other reasons to discipline Musselman. (Appendix A, p. 4a). Without the new allegations in the withheld document, only one person heard the one alleged threat, and Musselman showed a pattern of harassment and attempts to set him up that lasted years.

Musselman requests certiorari be granted to clarify *Hickman v. Taylor*, 329 U.S. 495 (1947) and adopt the Florida Supreme Court's 2004 holding in *Northup v. Acken*, 865 So.2d 1267 (Fla. 2004) that the Work Product Privilege is waived under *Hickman v. Taylor* when a document is withheld from discovery but intended to be used as evidence during trial. Mussselman also requests his First Amendment claim brought under 42 U.S.C. § 1983 against Nitchman be reinstated and remanded.

2. Certiorari should be granted to further define the bias of a decision maker in a *Loudermill* hearing under *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) when the decision maker manages a program that involves public funds that a whistleblower alleges is being mismanaged.

The Fourteenth Amendment as interpreted by this Court in *Loudermill* requires that an employee be given an opportunity to respond to allegations and that the governmental employer be willing to listen, otherwise the opportunity to respond required by *Loudermill* is no opportunity at all. U.S. Const.

Amend. XIV. *Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532,546 (1985).

This Court has outlined two general types of bias for decision makers which run afoul of the due process requirements of the Fourteenth Amendment. *Ward v. Village of Monroeville*, 409 U.S. 57,61 (1972), *Tumey v. Ohio*, 273 U.S. 510,535 (1927). First, due process is violated if a decision maker has a personal pecuniary interest in the proceedings. Id. Second, due process may also be offended where the decision maker, because of his or her institutional responsibilities, would have a strong a motive to rule in a way that would aid the institution. *Ward*, 409 U.S. at 61.

First, Nitchman had a bias based on personal pecuniary interest in the bringing of disciplinary charges against Newmon and Musselman because he assigned and was responsible for the Special Projects. Clerk's Papers ("CP")-80-7, pp. 29-30, CP-80-8, pp. 1-2. The *Loudermill* hearing presided over by Nitchman was a pretermination hearing, but it was effectively the only hearing because the post-termination hearing authority, the Marine Employees Commission contacted Musselman through his attorney and stated that the Marine Employees Commission would only hear a post-termination hearing if Musselman agreed not to bring up the fact that the senior management of the ferries involved in the Special Projects were also the senior members of the union at a Commission hearing. The Commission offered no offsetting guarantee for Musselman for giving up his rights to state what actually happened. This showed there

was widespread knowledge that the ferry management who were also senior union members were receiving substantial financial gains from the Special Projects. CP-63, p. 10.

In support of their response to Nitchman's motion for summary judgment, Musselman's and Newmon's attorney attached and authenticated a transcript of Nitchman's deposition from another civil action by certifying the pages of the transcript and the court reporter's certification were true and correct copies. *Orr v. Bank of America*, 285 F.3d 764,774 (9th Cir. 2002)(an attorney may authenticate sworn deposition excerpts). Nitchman clearly stated he was responsible to the CEO for "all engineering room budgets, all maintenance budgets, both capital and operating," CP-80-7, p. 18, and both Musselman and Newmon were criticizing the mismanagement of funds which were being paid from these budgets, including the Special Projects. CP-80-2, pp. 3,4, 76-1, pp. 2,3, 6.

Musselman also relied on public records which Musselman obtained under a state Public Records Act request and attached them to his declaration. The District Court did not strike the records. Fed. R. Evid. 803(8), 803(6). The records showed Nitchman was the person who was assigning the special projects under the program Musselman was complaining about and the records showed Nitchman specifically approved Allen's and Broxon's special projects.

Nitchman had at least six biases when he fabricated and ruled on the retaliatory charges which

were brought against Musselman and Newmon. CP-72, p. 16. First, at the time of the harassment, Nitchman's department was under investigation by the Washington State Department of Transportation for misuse of public funds. See 5/14/02 letter from DOT Director of Audits to Thorne, 6/14/02 letter from Thorne to DOT Director of Audits (which was copied to Nitchman), and 9/11/02 letter from Thorne to DOT Director of Audits (which was copied to Nitchman). CP-80, Ex. 2, pp. P1106,P1110,P1117.

Second, at the time of the harassment, Nitchman's department was under investigation by the Washington State Auditor. CP-72, p. 17, 7/18/03 letter from Washington State Auditor to Nitchman, July, 2002 auditor investigator telephone notes, August, 2002 auditor investigator telephone notes, 11/7/02 letter from Washington State Auditor to Nitchman. CP-80, Ex. 2, pp. P1023, P1027-9.

Third, Nitchman himself was responsible for the accounting for his department and the accounts from which the special projects were paid and Musselman was alleging that the Special Projects were wasteful of public funds and that there was massive pay padding occurring in an amount of tens of thousands of dollars per person. CP-72, p. 17, 80-7, p. 18.

Fourth, Nitchman had personally approved Special Projects for Broxon and Allen. CP-72, p. 17, 80-7, pp. 29-30, 80-8, pp. 1-2.

Fifth, Nitchman was both a member of the management and a member of the MEBA union and

therefore eligible for Special Projects money when he reverted to his union position which he did in December, 2004. CP-72, p. 17, CP-154,150.

Sixth, Nitchman was interviewed by the Bremerton Sun newspaper regarding the Special Projects during the Summer of 2002 which was going to place the spotlight on the Special Projects program Nitchman was in charge of. CP-72, p. 17, CP-80, Ex. 4. Nitchman began Musselman's *Loudermill* hearing with a statement that he had recently been interviewed by a reporter regarding the Special Projects. Fed. R. Evid. 801(d)(2)(A). Nitchman made the statement on his own initiative and the timing at the beginning of Musselman's *Loudermill* hearing left the clear impression that he had set up Musselman and was bringing the charges because Nitchman knew Musselman had been talking to reporters about the waste of millions of dollars of public money under the special projects program at a time when ferry service was being cut, services on the ferries such as food service were being cut, the passenger ferries were being phased out, and ferry runs were being cut. Musselman testified to these facts in his declaration which was not struck.

Seventh, the management is paid to perform overtime when Special Projects are conducted in-house rather than using outside qualified contractors and experts. CP-72, p. 17. In some cases, after the work was attempted in-house by unqualified managers, it had to be redone by outside qualified contractors.

Eighth, Nitchman appears to have entered into quid pro quo agreements with employees in which Special Projects and protection from whistleblowers was exchanged for continued protection and support of the senior union members for Nitchman's management position. This was evidenced by Carl Allen's transfer to Musselman's ferry and the first thing Allen asked the staff chief he was relieving was whether he had fired Musselman yet. Allen then assigned his staff including Mullens and Hare to prod Musselman. When Musselman stated he wanted the harassment to stop, Hare told Allen, and Nitchman then wrote Musselman up for an alleged threat. Nitchman then sat as the *Loudermill* decision maker.

In Newmon's case, the first member of the management not involved in Special Projects recommended dismissal and it was only after Newmon asked about Broxon's discipline for threatening him that Nitchman ordered a new *Loudermill* hearing and suspended Newmon.

Currently *Tumey* and *Ward* only focus on direct pecuniary gain from the decision and do not define the much more common bias caused by managing a program that is being criticized as wasteful of public funds by a person who is then harassed and brought up on charges by the manager of the program.

Musselman and Newmon request certiorari be granted to clarify *Tumey* and *Ward* to state that when a public employee criticizes the accounting or misuse of public funds of a publicly funded program

and is subsequently brought up on disciplinary charges by those involved in the program, anyone substantially responsible for the management, accounting, or disbursements of funds for the program being criticized has a bias that runs afoul of the minimum due process requirements of the Fourteenth Amendment if the person then sits as the decision maker in a *Loudermill* hearing. Musselman and Newmon request the Court reverse the dismissal of their Cause of Action Two and remand this cause of action for trial.

3. Certiorari should be granted because the district court decision affirmed by the Ninth Circuit overlooked the fact that several statements fall within exceptions to the hearsay rule or were not struck and created a question of fact on Musselman's First Amendment free speech claim brought under 42 U.S.C. § 1983 against Allen.

Musselman brought a First Amendment claim against Allen under 42 U.S.C. § 1983 because Allen harassed Musselman, caused co-workers to behave in a hostile manner toward him, and denied him the use of employee benefits such as the crew refrigerator to store his food during their 12 hour watches.

The District Court did not strike the first part of paragraph 4 of the Stell Declaration in which Allen asked when he first showed up whether Stell had "fired" Lance. Appendix G, p. 42a, CP-77, p. 2.

Musselman also testified that Allen's assistant Mullens came to Musselman to gather information on Musselman and in the process repeated Allen's statements that he wanted to fire Musselman because he was criticizing the Special Projects. Musselman repeated this statement at trial and the testimony is outlined below. Since Allen sent Mullens to obtain information on Musselman to set him up, Mullen's statements are admissible under the conspiracy exception to the Hearsay Rule. Fed. R. Evid. 801(d)(2)(D) and 801(d)(2)(E).

Musselman conducted several Public Records Act requests under state law, and after filing a civil action in King County Superior Court, Judge Charles Mertel ordered the State of Washington to produce public documents. These public documents included the document in which Nitchman approved one of the Allen Special Projects Musselman was complaining about just before Nitchman sent Allen to Musselman's ferry. CP-80-8, p. 2. This document is admissible under Fed. R. Civ. P. 803(8) and was not struck by the district court.

Finally, Musselman observed Allen have a heated argument with a relief chief regarding transferring money from the ferry budget to Special Projects. At one point, Allen angrily looked at Musselman and stated they would have to get at the people at Enron before they got to him. CP-80-2, p. 5. This statement is not hearsay under 801(d)(2)(A). This statement clearly ties Allen's own knowledge of his wrongdoing by comparing his actions to those of the Enron executives and he directed his anger at Musselman who had been an opponent of the waste

and misuse of public funds under the Special Projects for several years.

Since the First Amendment claim against Allen was dismissed on a motion for summary judgment, all facts are taken in a light most favorable to Mussleman and these facts clearly show there is a question of material fact regarding Allen's motivation for harassing Musselman. Fed. R. Civ. P. 56(c). Allen's constant harassment during Musselman's 12 hour watches caused damages to Musselman and Allen caused the other crew members to behave in a hostile manner toward Musselman. Musselman requests this Court grant certiorari and reverse the dismissal of his First Amendment claim against Allen.

4. Certiorari should be granted because the district court decision affirmed by the Ninth Circuit conflicts with the Washington State Supreme Court's interpretation of the Washington Law Against Discrimination as it relates to whistleblowers.

Musselman's Cause of Action Five is a retaliation cause of action brought under the Washington Law Against Discrimination ("WLAD"), R.C.W. Chapter 49.60. CP-141, p. 13. The statutory purpose of the Washington Law Against Discrimination is to remedy discrimination which the Washington State Legislature has concluded, "... threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." R.C.W. § 49.60.010. Musselman's retaliation cause of action is

included under the Washington Law Against Discrimination ("WLAD"). R.C.W. § 49.60.210. The Washington State Legislature specifically stated that R.C.W. Chapter 49.60 is to be liberally construed to affect its purposes. R.C.W. § 49.60.020. R.C.W. § 49.60.210(2) states:

> "(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW." R.C.W. § 49.60.210(2).

The legislative purpose of the Washington State Whistleblower Protection Law, R.C.W. Chapter 42.40 is described in the statute:

> "It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. ..." R.C.W. § 42.40.010.

R.C.W. § 42.40.050 states in relevant part:

> "(1) Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW. For the purpose of this section "reprisal or retaliatory action" means but is not limited to any of the following: ... (e) Unwarranted and unsubstantiated letters of

> reprimand or unsatisfactory performance evaluations; ... (i) Suspension; (j) Dismissal; ... (l) A supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower; ... " R.C.W. § 42.40.050.

To state a prima facie case under R.C.W. § 49.60.210, Musselman must show: (1) he engaged in statutory protected activity, (2) an adverse employment action was taken, and (3) a causal link between the employee's acts and the employer's adverse employment actions. When a plaintiff offers evidence of a discriminatory motive, a triable issue as to actual motive is created. *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061,1066 (9th Cir. 2003).

There are four ways an employee can become a whistleblower under R.C.W. Chapter 42.40. First an employee can produce evidence that he actually communicated with the Auditor's Office regarding a whistleblowing complaint. R.C.W. § 42.40.020(8). Second, the employee can be considered a whistleblower by the employer. Id. Third, he can challenge rules. Id. Fourth, he can submit a rule change to the rule committee. Id.

Musselman was a whistleblower under R.C.W. § 42.40.020(8) because he was considered by Allen a person who was believed to be a whistleblower, and he challenged the rules of the Special Projects. As will be argued below, Allen sent his assistant Mullens to gather information on Musselman and in the process, Mullens repeated Allen's comments that

Allen wanted to fire Musselman because he was criticizing the Special Projects. After a heated argument with a relief chief over the transfer of funds from a maintenance budget to the Special Projects, Allen angrily stated to Musselman that they would have to get people at Enron before they got him. Allen harassed him, caused the crew to behave in a hostile manner toward him, and refused to let him enjoy the benefits of employment such as the crew refrigerator.

Under the Law of the Case Doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court. *Old Person v. Brown*, 312 F.3d 1036,1039 (9th Cir. 2002). The Court previously found that Musselman was a whistleblower under his retaliation claim in that he engaged in activity protected by statute, which further supports the argument that Musselman was a whistleblower under R.C.W. § 42.40.020(8). Appendix H., p. 52a, (citing Order, CP-42-9).

The actions Musselman was complaining of are believed to be improper governmental conduct in that they were a gross waste of public funds and violations of federal or state rules. Nitchman approved Special Projects for Allen and Broxon. Allen was working on a Special Project that involved the duplicating of information which already existed. Musselman commented about the apparent waste of public funds at the union hall, at union meetings, to co-workers, and to a Bremerton Sun newspaper reporter. TR-194,195,204,205,206. Musselman also believed Allen's familiarization special project and Broxon's oil study was a waste of public resources

because they were simply copying information that already existed and padding their pay by tens of thousands of dollars per year as if they conducted the research and drafted the documents. TR-195,196.

Allen violated R.C.W. § 42.40.050(1) by: harassing Musselman and making demeaning comments regarding his personal hygiene, denying Musselman the employee benefits enjoyed by other employees such as use of the crew refrigerator, TR-220, damaging Musselman's reputation by telling union members Musselman was a "Crazy Vietnam Veteran", stating to co-workers he slept under a horse blanket, TR-212, assisting in setting up Musselman, and encouraging coworkers to behave in a hostile manner toward him. TR-219.

During trial, the Court ruled on the Motion for a Judgment as a Matter of Law. The Court ruled that there was no evidence showing Allen knew Musselman was the whistleblower, but the state whisleblower law only requires a person be considered a whistleblower. Appendix I. The Court then dismissed Cause of Action Five against Allen, and dismissed Allen from the case.

The District Court erred because a reasonable jury could have found Musselman was considered a whistleblower by Allen or that he challenged rules. R.C.W. § 42.40.020(8). Allen's assistant Scott Mullens had been gathering information on Musselman and assisting Allen in setting him up and at one point Mullens came to Musselman and stated that Carl Allen wanted to fire Musselman for speaking about the Special Projects:

> "Q. Did Scott Mullin ever come up to you and relay a message from Carl Allen?
> A. Yes, he did. He took me aside, and he said, you better stop talking about Special Projects because Carl Allen wants to fire you.
> Q. Can you remember what time frame that was?
> A. Well, I think Carl Allen came on the boat in late April or something. I don't know.
> Q. Was it shortly after he came onboard? Is that what you're saying?
> A. Yeah. It was not too long after. It might have been a couple work weeks, maybe three." TR-208 (Trial Transcript of 11/10/05 Musselman Testimony, p. 208, lines 2-6).

Since Mullens was conspiring with Allen to gather information on Musselman so that Allen could retaliate against Musselman, Allen's statements repeated by Mullens are admissible under the conspiracy exception, Fed. R. Evid. 801(d)(2)(D) and 801(d)(2)(E).

At the *Loudermill* hearing, Musselman informed Nitchman of this fact:

> "Q. Now during the Loudermill hearing did - - what else did you tell Mark Nitchman about Carl Allen?
> A. I told him the reason that they were going to fire me is because I spoke out about special projects and that Scott Mullin told me that Carl Allen had intentions of firing me for

speaking out about special projects ..." Id. at p. 221, lines 3-8.

Bruce Stell further testified that Allen asked if Stell had fired Musselman when he first came to the ferry. TR-33.

The Court should grant the petition and reverse the dismissal of Musselman's state whistleblower retaliation cause of action against Allen because when the evidence is viewed in the light most favorable to the nonmoving party Musselman, and all reasonable inferences are drawn in favor of Musselman, there is a legally sufficient evidentiary basis for a reasonable jury to find for Musselman. Fed. R. Civ. P. 50(a)(1). Musselman was a whistleblower in that he was considered someone who was a whistleblower and he was challenging the rules related to the Special Projects.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, and ultimately, to reverse the order and remand several causes of action for trial. The bureaucratic justifications for compromising the individual rights of whistleblowers are limitless, yet every time this happens the rights of both the whistleblower and the public are compromised. The clarifications and rules requested in this writ protect the individual rights of whistleblowers who act as the spokespersons for the public in opposing abuses of public power and the misuse of public funds.

Respectfully submitted,
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APPENDIX A

Court of Appeals Case No. 06-35009
District Court Case No. CV-04-00984-RSM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANCE MUSSELMAN, an engine oiler and a single man; BOB NEWMON, an engine oiler and a single man,
Plaintiffs - Appellants,

v.

MARK NITCHMAN, Director of Maintenance of Washington State Ferries; BEN BROXON, Staff Chief of Washington State Ferries; CARL ALLEN,
Defendants - Apppellees.

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted September 24, 2007
Seattle, Washington

Before: B. FLETCHER, KLEINFELD, and GOULD, Circuit Judges.

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R.

36-3.

Appellant Lance Musselman was terminated and appellant Bob Newmon was disciplined. They were engine room oilers for the Washington State Ferries ("WSF") at the time of these events. They allege they suffered these adverse actions for speaking out against WSF managers who were paid in addition to their regular salaries to undertake an allegedly wasteful special project. They brought suit in district court against appellees WSF managers Mark Nitchman, Carl Allen, and Ben Broxon.[1] We do not recite the facts as they are well-known to the parties.

The district court dismissed seventeen of appellants' claims by summary judgment. Three more claims were dismissesd by judgment as a matter of law after conclusion of appellant' case. Three of appellants' claims, all for violations of free speech rights, were decided in appellees' favor by jury verdict.

Appellants challenge dismissal of four claims by summary judgment: Musselman's First Amendment claim against Allen; Musselman and Newmon's Fourteenth Amendment claim against Nitchman; Newmon's outrage claim against Broxon brought under Washington tort law; and Newmon's retaliation claim against Broxon brought under Washington Law Against Discrimination (WLAD), R.C.W. Chapter 49.60. Appellants also challenge the dismissal of two claims by judgment as a matter of law: Musselman's retaliation claim against Allen brought under WLAD and Musselman's wrongful

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[1] WSF CEO Michael Thorne was also a defendant but all claims against him were dismissed and not appealed.

discharge in violation of public policy claim against Nitchman. Appellants further challenge an evidentiary ruling by the district court and the district court's denial of their motion for a new trial. They also request attorneys' fees.

Appellees present a threshold motion to strike a substantial portion of the Brief of Appellant which we grant because the challenged portions of the Statement of Facts rely on portions of the record previously held inadmissible by the district court and unchallenged by appellants in this court.

We reverse and remand for further consideration of the district court's grant of summary judgment on Newmon's claim against Broxon for outrage. The district court did not reach the question of the level of outrageousness of Broxon's conduct. The district court, applying the standard set forth by the state intermediate court of appeals in *Haubry v. Snow*, 31 P.3d 1186 (Wash.App. 2001), concluded that Newmon's claim was foreclosed because he had not provided sufficient objective medical evidence of his emotional distress. The Washington Supreme Court subsequently clarified that objective medical evidence of emotional distress is not required to establish a cause of action for outrageous conduct. See *Kloepfel v. Bokor*, 66 P.3d 630,633 (Wash. 2003). Under Washington law, the question whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct is sufficiently extreme to result in liability. *Grimsby v. Samson*, 530 P.2d 291, 295-6 (Wash. 1975) (adopting Restatement of Torts § 46 (1965)).

When considering whether reasonable minds could differ on whether Broxon's conduct was sufficiently extreme, among other things the district court must take into account that Broxon was Newmon's supervisor, that he allegedly exposed Newmon to noise for time periods violating Washington State Department of Labor & Industry Standards, and that Broxon allegedly secluded Newmon alone in a tool room and threatened him that were he to speak against special projects "things can happen to people, things can happen to their family, and their house can burn down, because it is easy to find out where someone lives."

We affirm the dismissal by summary judgment of Musselman's First Amendment claim against Allen; Musselman and Newmon's Fourteenth Amendment claim against Nitchman; and Newmon's retaliation claim against Broxon because appellants fail to present admissible evidence to support their claims. We also affirm the dismissal by judgment as a matter of law of Musselman's retaliation claim against Allen and Musselman's wrongful discharge claim against Nitchman because Musselman fails to present admissible evidence to support his claims. We do not reach the issue of whether the district court abused its discretion in admitting Exhibits 141 and 142.[2] Therefore we deny appellants' request for a new trial based on Federal Rule of Civil Procedure 60(b)(3). We also deny appellants' request for fees. Each party except Newmon shall bear his or its own costs. Newmon shall have costs to be born by

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[2] In light of the overwhelming other evidence of Musselman's conduct that would warrant his dismissal, the admission of the challenged exhibit was harmless.

appellees. Thus the district court's decision is:

AFFIRMED IN PART, REVERSED IN PART AND REMANDED IN PART.

FILED 11/02/07

APPENDIX B

Court of Appeals Case No. 06-35009
District Court Case No. CV-04-00984-RSM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANCE MUSSELMAN; et al.,
Plaintiffs - Appellants,

v.

MARK NITCHMAN; et al.,
Defendants - Apppellees.

ORDER

Before: B. FLETCHER, KLEINFELD, and GOULD, Circuit Judges.

The panel has voted to deny the motion for reconsideration. Judges Kleinfeld and Gould vote to deny the motion for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The motion for reconsideration and the motion for rehearing en banc are denied.

FILED 12/11/07

APPENDIX C

Court of Appeals Case No. 06-35009
District Court Case No. CV-04-00984-RSM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANCE MUSSELMAN; et al.,
Plaintiffs - Appellants,

v.

MARK NITCHMAN; et al.,
Defendants - Apppellees.

ORDER

Before: B. FLETCHER, Circuit Judge

Appellant's motion for stay of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the U.S. Supreme Court. The stay expires ninety (90) days from the date of this order unless Appellant files a petition for the writ and so notifies the Clerk of our court in writing within the period of the stay. In that case, the stay shall continue until final disposition by the Supreme Court.

FILED 12/20/07

APPENDIX D

Case No. C04-0984RSM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MUSSELMAN, *et al.*,
Plaintiffs,

v.

MARK NITCHMAN, *et al.*,
Defendants.

JUDGMENT IN A CIVIL ACTION

[X] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by the Court. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
Date: November 29, 2005

Bruce Rifkin
Clerk of Court
s/ Rhonda Stiles
(by) Deputy Clerk

APPENDIX E

Case No. C04-0984RSM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MUSSELMAN, *et al.*,
Plaintiffs,

v.

MARK NITCHMAN, *et al.*,
Defendants.

SPECIAL VERDICT FORM
RE: LANCE MUSSELMAN

We, the Jury, answer the questions submitted by the Court as follows:

QUESTION 1: Did Defendant Nitchman violate the free rights of Plaintiff Musselman under the First Amendment of the United States Constitution?

ANSWER: __X__ Yes _____ No

If you answered "Yes," please proceed to Question 2. If you answered "No," do not answer any further questions; you are finished with this form. The presiding juror should sign and date this form and return it to the in-court deputy.

QUESTION 2: Do you find that Defendant Nitchman would have taken the same adverse employment actions even if Plaintiff Musselman had not exercised his free speech rights under the First Amendment of the United States Constitution?

ANSWER: __X__ Yes _____ No

If you answered "No," please proceed to Question 3. If you answered "Yes," do not answer any further questions; you are finished with this form. The presiding juror should sign and date this form and return it to the in-court deputy.

QUESTION 3: What do you find are the amount of compensatory damages against Defendant Nitchman for the violations of Plaintiff Musselman's free speech rights?

ANSWER: $ _____

Please proceed to Question 4.

QUESTION 4: Do you find that Defendant Nitchman's conduct was malicious, or in reckless disregard of Plaintiff Musselman's First Amendment rights?

ANSWER: _____ Yes _____ No

If you answered "Yes," please proceed to Question 5. If you answered "No," please proceed to Question 6.

QUESTION 5: What do you find are the amount of punitive damages against Defendant Nitchman?

ANSWER: $ _____

Please proceed to Question 6.

QUESTION 6: Do you find that Plaintiff Musselman failed to mitigate his damages?

ANSWER: _____ Yes _____ No If "Yes," what percentage of damages listed in Answer 3 did Mr. Musselman fail to mitigate? ____ %

After you have answered all of the appropriate questions on this form, the presiding juror should sign and date below and inform the in-court deputy that you have reached a verdict.

DATED this 18th day of November, 2005.

s/ Richard S. Johnson
Presiding Juror

APPENDIX F

Case No. C04-0984RSM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MUSSELMAN, *et al.*,
Plaintiffs,

v.

MARK NITCHMAN, *et al.*,
Defendants.

SPECIAL VERDICT FORM
RE: BOB NEWMON

We, the Jury, answer the questions submitted by the Court as follows:

QUESTION 1: Did Defendant Nitchman or Defendant Broxon violate the free rights of Plaintiff Newmon under the First Amendment of the United States Constitution?

ANSWER: Defendant Nitchman ____ Yes __X__ No
Defendant Broxon ____ Yes __X__ No

If you answered "Yes," for either defendant, please proceed to Question 2. If you answered "No," for both defendants, do not answer any further questions; you are finished with this form. The

presiding juror should sign and date this form and return it to the in-court deputy.

QUESTION 2: Do you find that Defendant Nitchman or Defendant Broxon would have taken the same adverse employment actions even if Plaintiff Newmon had not exercised his free speech rights under the First Amendment of the United States Constitution?

ANSWER:
Defendant Nitchman (if applicable) ____ Yes ____ No
Defendant Broxon (if applicable) ____ Yes ____ No

If you answered "No," for either defendant, please proceed to Question 3. If you answered "Yes," for both defendants, do not answer any further questions; you are finished with this form. The presiding juror should sign and date this form and return it to the in-court deputy.

QUESTION 3: What do you find are the amount of compensatory damages against Defendant Nitchman or Defendant Broxon for the violations of Plaintiff Newmon's free speech rights?

ANSWER:
Defendant Nitchman (if applicable) $_____
Defendant Broxon (if applicable) $_____

Please proceed to Question 4.

QUESTION 4: Do you find that Defendant Nitchman's or Defendant Broxon's conduct was

malicious, or in reckless disregard of Plaintiff Newmon's First Amendment rights?

ANSWER:
Defendant Nitchman (if applicable) ____ Yes ____ No
Defendant Broxon (if applicable) ____ Yes ____ No

If you answered "Yes," for either defendant, please proceed to Question 5. If you answered "No," for both defendants, please proceed to Question 6.

QUESTION 5: What do you find are the amount of punitive damages against Defendant Nitchman or Defendant Broxon?

ANSWER:
Defendant Nitchman (if applicable) $_____
Defendant Broxon (if applicable) $_____

Please proceed to Question 6.

QUESTION 6: Do you find that Plaintiff Newmon failed to mitigate his damages?

ANSWER: _____ Yes _____ No If "Yes," what percentage of damages listed in Answer 3 did Mr. Newmon fail to mitigate? ____ %

After you have answered all of the appropriate questions on this form, the presiding juror should sign and date below and inform the in-court deputy that you have reached a verdict.

DATED this 18th day of November, 2005.

s/ Richard S. Johnson
Presiding Juror

APPENDIX G

Case No. C04-0984RSM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MUSSELMAN, *et al.*,
Plaintiffs,

v.

MARK NITCHMAN, *et al.*,
Defendants.

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court for consideration of the motions for summary judgment filed by defendants Thorne (Dkt. # 68), Allen (Dkt. # 69), and Broxon (Dkt. # 70). On July 5, 2005, the Court issued a ruling on a similar motion by defendant Nitchman (Dkt. # 85). For the convenience of the litigants, the Court restates here the portions of that Order which also apply to the pending motions for summary judgment. Rulings on the three remaining summary judgment motions shall follow.

II. DISCUSSION

A. Background

In this lawsuit, plaintiffs, one former and one current employee of the Washington State Ferry ("WSF") system, claim that they were either fired or disciplined for speaking adversely against Special Projects undertaken by management. The claims by each plaintiff are discussed separately below.

Plaintiff Musselman was an employee of WSF for 20 years before being terminated in 2002. He primarily worked as an oiler. Between June of 2002 and August of 2002, Musselman apparently heard that defendant Broxon, one of Musselman's managers, was involved in a Special Project pertaining to lube oil used in the ferry engines. Musselman believed that the study was a waste of public funds, and began questioning co-workers about the project, and making comments that the project was a waste of money. Musselman alleges that after defendant Allen, another WSF manager, heard him asking such questions, Allen began harassing him at work. Musselman also apparently heard from a co-worker that Allen said he wanted to fire Musselman for asking questions. Musselman also alleges that Allen tried to discredit him among the union members, calling him a "crazy Vietnam vet," and other derogatory names.

During the same time period, defendant Nitchman, a senior manager at WSF, brought discipline charges against Musselman. Musselman alleges these charges were brought as retaliation for speaking out against the Special Project. Defendant

Nitchman claims that the charges were brought against Musselman as a result of a prior disciplinary hearing that occurred before Musselman began questioning the Special Project. Musselman was terminated on or about October 25, 2002.

Musselman was subsequently informed by the union that they would not represent him in a grievance procedure. Allen, Nitchman and Broxon were all senior union members at that time, as well as WSF managers. It appears from the record that the six-month union grievance procedure expired, and Musselman did not make a grievance. However, Musselman submitted an unfair labor practice complaint to the Washington State Marine Employees Commission ("MEC"). The MEC apparently told Musselman it would only hear his complaint if he removed the claim that the WSF managers were also senior members of the union. Musselman determined that pursuing any claim with the MEC would be futile, and declined to pursue the complaint. He then submitted a tort claim form to the State of Washington, and subsequently filed this lawsuit.

Plaintiff Newmon was hired as an oiler by WSF in December of 2000. At some point, Newmon also learned of defendant Broxon's lube oil Special Project, and commented that the study appeared to be a waste of public funds because a similar study had already been completed by the oil companies and engine manufacturers. Newmon also questioned various co-workers about how the study was being conducted. Broxon learned that Newmon had been asking questions and allegedly assigned him to poor work assignments as a result.

Newmon alleges that Broxon also threatened him, stating that he should not speak against the Special Project because "things can happen to people, things can happen to their family, and their house can get burned down, because it is easy to find out where someone lives." Broxon also apparently told Newmon about other WSF employees that had questioned Special Projects, who had been demoted or injured as a result.

Newmon alleges that one day when he was being threatened, he decided he could no longer work with Broxon because he feared for his safety, so he requested a replacement worker for his shift, and, when that replacement arrived, he left the ferry. Broxon then apparently contacted defendant Nitchman, who charged Newmon with leaving his post and being disrespectful to his supervisor. Newmon alleges that these charges were brought in retaliation for speaking against the Special Project. Defendants claim that Newmon's discipline resulted from failing to finish his shift, and walking away from his job.

Newmon then contacted the Washington State Patrol ("WSP") about the threats. The WSP apparently informed him that he should speak with his union. Newmon determined that contacting his union would be futile since his managers were also senior members. The WSF staff chief apparently made a cursory investigation of the incident, and Broxon admitted to making a statement to Newmon about a different employee who had questioned Special Projects. Newmon subsequently participated in two disciplinary hearings, and eventually was suspended for two weeks without pay, and given an

adverse employment letter. Newmon then filed a complaint with the Washington State Human Rights Commission. He requested a right-to-sue letter, which was granted by the Commission. Newmon then submitted a tort claim form to the State of Washington, followed by this lawsuit. Newmon remains an employee of WSF.

In their amended complaint, plaintiffs have also presented facts related to a pattern and practice of retaliation against other employees who had previously spoken against Special Projects, which resulted in harassment and false adverse employment complaints.

Plaintiffs have alleged seven causes of action, including violation of their right to free speech pursuant to 42 U.S.C. § 1983, violation of procedural due process based on structural bias pursuant to 42 U.S.C. § 1983, negligent infliction of emotional distress under Washington State common law, Washington State common law outrage, violations of Washington State's discrimination statute, wrongful discharge under Washington State common law, and breach of contract under Washington State contract law. They request an award and damages in an amount to be determined by the Court.

On December 2, 2004, defendants moved for summary judgment based on qualified immunity. (Dkt. #19). The Court declined to grant summary judgment, finding that plaintiffs had engaged in constitutionally-protected speech, that WSF's interests had not outweighed Newmon's or Musselman's interest in expressing themselves, that defendants were on fair notice that plaintiffs' speech was constitutionally protected and the law was

clearly established at the time of plaintiffs' conduct, that defendants' actions were not objectively reasonable, and therefore, qualified immunity does not apply as a defense in this case. (Dkt. #42).

Defendants have now separately moved for summary judgment in favor of all of the defendants, arguing that plaintiff has failed to produce any evidence during discovery, including witnesses, testimony, or physical evidence, that would raise any genuine issue of material fact requiring a trial in this case.

B. Summary Judgment Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Genuine factual issues are those for which the evidence is such that "a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Material facts are those which might affect the outcome of the suit under governing law. *See id.* In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *O'Melveny & Meyers*, 969 F.2d at 747).

C. Motion to Strike Affidavits Under Local Rule 7(g)

As a threshold matter, the Court first addresses defendant's request to strike the affidavits of Marable, Newmon, Stell, Kuykendall and Hart, which were submitted in support of plaintiffs' response to the instant motion. (*See* Dkt. #84 at 2). Defendant argues that the affidavits in question do not meet the criteria set forth in Rule 56(e) of the Federal Rules of Civil Procedure, which states that affidavits in support of, or opposition to, summary judgment "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e).

The Ninth Circuit Court of Appeals has often rejected statements contained in affidavits that are based on information and belief, rather than on personal knowledge. *See, e.g., Columbia Pictures Indus., Inc. v. Professional Real Estate Investors,*

Inc., 944 F.2d 1525, 1529 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993). Likewise, courts have determined that where it is not selfevident "from his job title or the activities which he describes in the affidavit" an affiant is not competent to testify to the matters stated within his affidavit, and striking such statements is appropriate. *See, e.g., Ramada Franchise Systems, Inc. v. Tresprop, Ltd.*, 75 F. Supp.2d 1205, 1209 (D. Kan. 1999). The Court has reviewed the affidavits and declarations at issue in this case, and finds as follows:

1. Mr. Newmon's Affidavit

In his affidavit, Mr. Newmon has not sworn that the statements contained therein are based on personal knowledge. Rather, many of his statements begin with the qualifier "I believe." Accordingly, those sentences, contained in paragraph numbers 3, 5, 8, 14, 16 and 17, are hereby STRICKEN, and the Court will not consider the statements when making its decision below. In addition, it is not evident from Mr. Newmon's job description as an oiler aboard the Walla Walla, or from the activities which he describes, that he is competent to testify to Mr. Broxon's employment status or special projects work, or to Mr. Kathlean's employment aboard the Walla Walla. Accordingly, the Court also STRIKES the second sentence of paragraph 2, the first sentence of paragraph 7, and paragraphs 3, 5 and 8 in their entirety. The remainder of Mr. Newmon's affidavit appears to be based on his personal knowledge of, or involvement in, the activity he is describing, and will not be stricken.

2. Mr. Stell's Declaration

The majority of Mr. Stell's declaration appears to be based on his personal knowledge of, or involvement in, the activity he is describing, and will not be stricken. However, the Court will STRIKE the last sentence of paragraph 4, which is based only on Mr. Stell's "belief."

3. Mr. Kuykendall's Declaration

The majority of Mr. Kuykendall's declaration appears to be based on his personal knowledge of, or involvement in, the activity he is describing, and will not be stricken. However, the Court will STRIKE the last sentence of paragraph 4, which is based only on Mr. Kuykendall's "belief."

4. Mr. Marable's Declaration

Much of Mr. Marable's declaration is based on "anecdotal evidence," or statements "heard" from other persons. It is not evident from Mr. Marable's job description as a chief, or from the activities which he describes, that he is competent to testify to much of the evidence he attempts to introduce with those statements. Moreover, a substantial portion of Mr. Marable's declaration is based on inadmissible hearsay. Accordingly, the Court STRIKES all of paragraph 3 except for the first sentence, those portions of paragraph 6 that pertain to Nitchman's actions and the Oil Eater 99, sentence one of paragraph 8, sentence one of paragraph 12, and

paragraphs 4, 10, 13, 14 and 15 in their entirety.

5. Mr. Hart's Declaration

Mr. Hart's declaration is made in his capacity as plaintiffs' attorney in this case, and presents several documents as evidence for this Court's consideration. Mr. Hart states, under the penalty of perjury, that each document is a true and correct copy. It is not clear from the declaration whether the statements are based on personal knowledge; however, many of the documents are those created by Mr. Hart, or submitted to this Court in their original forms by Mr. Hart. (*See* Exs. 1, 2, 3 and 8). In addition, Mr. Hart has submitted copies of documents he received in response to his own discovery requests. (*See* Exs. 4, 5 and 6). Accordingly, the paragraphs related to those exhibits will not be stricken. However, it appears that there are several documents to which it is not evident from Mr. Hart's affidavit that he is competent to testify. Accordingly, paragraphs 7, 8 and 10, along with the corresponding Exs. 6, 7 and 9, shall be STRICKEN in their entirety. *See American Rock Salt Co., LLC v. Norfolk Southern*, 180 F. Supp.2d 420, 423 (W.D.N.Y. 2001) (explaining that an attorney's affidavit that is not based on personal knowledge carries no weight and should be disregarded); *Foster v. Allied Signal, Inc.*, 98 F. Supp.2d 1261, 1265 (D. Kan. 2000) (striking an attorney affidavit that contained hearsay statements and unauthenticated documents).

III. SUMMARY JUDGMENT MOTIONS

A. Defendant Michael Thorne

In their amended complaint (Dkt. # 63), plaintiffs have asserted three causes of action against defendant Michael Thorne, former CEO of the Washington State Ferries, and now retired. In Cause of Action One, for violation of plaintiffs' rights under the First and Fourteenth Amendments, brought pursuant to 42 U.S.C. § 1983, plaintiffs state that Thorne "failed to remedy the violation of Plaintiffs' rights after learning of them"; "created or maintained the policies or customs under which unconstitutional practices occurred"; "exercised gross negligence in supervising Broxon and Allen"; and "exhibited deliberate indifference by failing to act on information indicating that unconstitutional violations were occurring." Amended Complaint, ¶ 4.2. In moving for summary judgment, defendant Thorne contends that plaintiffs have no admissible evidence to assert a cause of action under § 1983 against him.

In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that (a) the defendant acted under color of state law, and (b) the defendant's conduct deprived plaintiff of a constitutional right. *Balistreri v. Pacifica Police Department*, 901 F. 2d 696, 699 (9th Cir. 1988). In addition, the plaintiff must allege facts showing how each named defendant caused or personally participated in causing the harm alleged. *Arnold v. IBM*, 637 F. 2d 1350, 1355 (9th Cir. 1981). A suit brought pursuant to § 1983 cannot be based on vicarious liability alone, but must allege that each defendant's own conduct violated the plaintiff's civil

rights. *City of Canton v. Harris*, 489 U.S. 378, 385-90 (1989). A plaintiff may not hold supervisory personnel liable under 42 U.S.C. § 1983 for constitutional deprivations under a theory of respondeat superior. *Taylor v. List*, 880 F. 2d 1040, 1045 (9th Cir. 1989).

Thorne's motion for summary judgment on Cause of Action One is based on his contention that plaintiffs have produced no admissible evidence that he personally participated in terminating them for their exercise of free speech. Plaintiffs, in response, argue the general law of liability of state officers under § 1983 without addressing Thorne's personal participation argument. They point to no actual evidence that would raise a genuine issue of fact regarding Thorne's participation in their termination. Their argument appears to seek to impose liability upon Thorne as a supervisor under the doctrine of respondeat superior, which is not applicable in § 1983 actions. Moreover, the only actual statements regarding Thorne in plaintiffs' affidavits have either been stricken for lack of personal knowledge, or are irrelevant to the issue of his personal participation. Accordingly, plaintiffs have failed to state a claim under § 1983 against defendant Throne. His motion for summary judgment as to Cause of Action One will be granted, and this cause dismissed as to Thorne.

In Cause of Action Six, plaintiffs assert a state law claim for wrongful discharge against defendant Thorne. However, this section of the complaint itself makes no factual allegations with respect to Thorne. Further, in opposing summary judgment, plaintiffs have produced no admissible evidence that Thorne

acted in any way to discharge Musselman, or even that he knew of the termination. The three internal audit memos from Thorne cited by plaintiffs discuss ferry employees' travel expenses, travel vouchers, and employee reimbursements, and have no relevance to Musselman or his termination. Declaration of Shawn Hart, Exhibit 2, P1106, P1100, P1111. Defendant Thorne's motion for summary judgment on Cause of Action Six, the wrongful termination claim, will therefore be granted, and this cause dismissed as to Thorne.

In Cause of Action Seven, plaintiffs assert a claim of breach of contract and breach of the implied duty of good faith and fair dealing against defendant Thorne. This claim is based on the same allegations as were made against defendant Nitchman, namely that these two defendants "allow[ed] management to maintain their active membership in the MEBA [union]." Amended Complaint, ¶ 10.3. The Court previously found no basis for breach of contract claim against Nitchman, and the Court's analysis of that claim applies here. Plaintiffs have stated no facts to overcome that ruling. Defendant Thorne's motion for summary judgment on Cause of Action Seven will therefore be granted, and this cause dismissed as to Thorne.

B. Defendant Carl Allen.

Plaintiffs have asserted three causes of action against defendant Carl Allen, chief of staff of the Washington State Ferry *Quinault*. In Cause of Action One, under § 1983, plaintiffs assert with respect to Allen that he "directly participated in the

violations of Plaintiffs' rights." Amended Complaint, ¶ 4.2. However, other than Musselman's conclusory allegations that Allen harassed him by not allowing him to use the crew refrigerator, the only evidence to which plaintiffs point in support of this claim are hearsay statements by Allen regarding firing Mussleman. Plaintiff's Response, p. 14. The portions of the Marable and Stell Declarations upon which plaintiffs rely in making this allegation have been stricken. Accordingly, defendant Allen's motion for summary judgment as to Cause of Action One will be granted, and the § 1983 claim dismissed as to defendant Allen.

In Cause of Action Three, plaintiffs assert a claim of negligent infliction of emotional distress against Allen. The Court found in the previous Memorandum Order on Nitchman's motion for summary judgment that plaintiffs had failed to produce objective medical evidence of such distress. The unauthenticated copies of Musselman's medical appointments and prescriptions in the record appear to indicate that he was under treatment for alcohol dependence and anxiety, but nowhere is there a diagnosis or other objective medical evidence connecting these problems with Allen's treatment of Musselman. Declaration of Hart, Exhibit 2, P1154-1164, P1172-73. Allen's motion for summary judgment as to the emotional distress claim will therefore be granted, and Cause of Action Four dismissed as to defendant Allen.

In Cause of Action Five, plaintiffs allege that Allen violated the "whistleblower" and other sections of the Washington Law Against Discrimination, RCW 49.60. Specifically, plaintiffs allege that Allen

violated Musselman's rights under this statute. Amended complaint, ¶ 8.2. As the Court found previously, in the Order on Nitchman's motion for summary judgment, that Musselman qualifies as a whistleblower under this statute, Allen's motion for summary judgment on this claim will be denied.

C. Defendant Ben Broxon.

Plaintiffs have asserted four claims against defendant Broxon, chief of staff of the Washington State Ferry *Walla Walla*. In Cause of Action One under § 1983, plaintiffs allege that Broxon "directly participated" in the violation of Newmon's rights. Specifically, plaintiffs allege that Broxon began harassing Newmon after learning that Newmon had criticized the Special Project as a waste of public funds and started asking questions about it. The method of harassment was by ordering Newmon to work in a loud engine room, and by issuing the following threat: You should not speak about the Special Projects because things can happen to people, things can happen to their family, and their house can get burned down, because it is easy to find out where someone lives. Amended complaint, ¶ 3.5.

Broxon argues that this claim should be dismissed because plaintiff Newmon has no evidence that Broxon was involved in a Special Project, no evidence that a special project involving a study of lube oil was taking place, and has no evidence to support his claim that, if such as study was taking place, it was a waste of public money. However, none of these assertions is relevant to Newmon's § 1983 claim. He does not claim to know that Broxon was

involved in the Special Projects; his claim is that Broxon harassed and threatened him for criticizing and questioning the oil lube project.

Broxon also points out that in Newmon's deposition, he stated that the only person he could name as someone to whom he made comments about the special projects was his girlfriend, Jane Ellis. Broxon argues that Newmon's affidavit in opposition to summary judgment contradicts the sworn statements he made at deposition. Defendant correctly asserts that a party may not contradict deposition statements in a later filed affidavit to avoid summary judgment. "A party cannot create a triable issue of fact, and thus survive summary judgment, merely by contradicting his or her own sworn deposition with a later declaration." *Disc Golf Association v. Champion Discs, Ind.*, 158 F. 3d 1002, 1008 (9th Cir. 1998). However, Newmon's affidavit does not actually contradict the statements at deposition. In the non-stricken portions of his affidavit, Newmon states that he challenged Broxon about the oil lube Special Project (¶ 4), that he conducted an investigation by asking questions about the Special Projects (¶ 6), and that Broxon told him not to speak about the Special Projects because bad things could happen to him (¶ 7). This does not contradict what Newsom stated in his deposition, because the deposition questions were not framed to elicit answers regarding his investigation or his questions directly to Broxon. Instead, he was asked to name people to whom he commented or complained. Deposition of Bob Newmon, p. 72. Moreover, the complete deposition is not before the Court. For these reasons, the Court declines to find

that Newmon's affidavit is a sham or contradictory to his deposition testimony. Broxon's motion for summary judgment on the § 1983 claim shall be denied.

In Cause of Action Three, plaintiffs assert a claim of negligent infliction of emotional distress against Broxon. The Court found in the previous Memorandum Order on Nitchman's motion for summary judgment that plaintiffs had failed to produce objective medical evidence of such distress. With respect to Newmon, the Court noted that the single unauthenticated medical report did not raise a genuine issue of material fact. Defendants have asserted no basis for revisiting this ruling. Accordingly, Broxon's motion for summary judgment on Cause of Action Three shall be granted, and this claim dismissed.

In Cause of Action Four, Newmon alleges that Broxon's threats and harassment constituted the state law tort of outrage. Broxon contends that this claim fails for the same reason as the claim of negligent infliction of emotional distress—namely, a lack of objective medical evidence. Broxon also argues that even if Newman's allegations of harassment and threats are believed, his actions do not rise to the extreme level required to constitute the tort of outrage.

The elements of the tort of outrage in Washington State are: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Haubry v. Snow*, 106 Wash. App. 666, 680 (2001). The conduct in question must be outrageous and extreme, so as to

be intolerable in a civilized society. *Id.*; *citing Grimsby v. Samson*, 85 Wash. 2d 52, 59 (1975). When one in a position of authority, such as a supervisor, commits the actions, the claim of outrageous behavior has added impetus. *Contreras v. Crown Zellerbach*, 88 Wash. 2d 735, 740 (1977). The question of whether certain conduct is sufficiently outrageous to constitute a tort is ordinarily one for the jury, but it is initially for the Court to determine whether reasonable minds could differ on the question. *Haubry*, 106 Wash. App. at 680.

Here, the Court does not reach the question of the level of outrageousness of Broxon's conduct, because Newmon's claim is foreclosed by the Court's ruling that he has not provided sufficient objective medical evidence of his emotional distress. *Id.* Accordingly, summary judgment shall be granted as to this claim.

Finally, in Cause of Action Five, Newmon asserts a claim against Broxon under RCW 49.60, the Washington Law Against Discrimination; he asserts that Broxon violated RCW 49.60.210, which forbids retaliation against a whistleblower by a supervisor. However, the Court has already ruled, in the Nitchman Order, that Newmon has not proven that he is a statutory whistleblower. Memorandum Order, p. 13. Accordingly summary judgment shall be granted to Broxon on this claim.

CONCLUSION

Accordingly, the Court now rules as follows:
(1) Defendant Thorne's motion for summary judgment (Dkt. # 68) is GRANTED, and all claims

dismissed as to him.

(2) Defendant Allen's motion for summary judgment (Dkt. # 69) is GRANTED IN PART and DENIED IN PART. Summary judgment is granted as to Causes of Action One and Three, and these claims are DISMISSED as to defendant Allen. Summary judgment on Cause of Action Five under RCW 49.60 is DENIED, and this claim remains pending for trial.

(3) Defendant Broxon's motion for summary judgment (Dkt. # 70) is GRANTED IN PART and DENIED IN PART. Summary judgment is GRANTED as to Causes of Action Three, Four, and Five as set forth above, and these claims are DISMISSED as to defendant Broxon. Summary judgment on Cause of Action One is DENIED, and this claim remains pending for trial. With the claims and issues thus narrowed, the Court directs the parties to proceed to mediation as ordered on July 28, 2005.

DATED this 3rd day of August, 2005.

s/ RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

APPENDIX H

Case No. C04-0984RSM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MUSSELMAN, *et al.*,
Plaintiffs,

v.

MARK NITCHMAN, *et al.*,
Defendants.

MEMORANDUM ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT NITCHMAN'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on defendant Nitchman's second Motion for Summary Judgment. (Dkt. #67). Defendants argue that plaintiffs have failed during discovery to produce any evidence in support of their claims against defendant Nitchman, and therefore seek dismissal of plaintiffs' § 1983 claims, negligent infliction of emotional distress claim, Washington state discrimination claim, wrongful discharge claim, and breach of contract claim. Defendant also moves pursuant to Local Rule CR 7(g) to strike the affidavits in support of plaintiffs' response to the instant motion, arguing,

inter alia, that they contain inadmissible evidence because they are not made with personal knowledge and because they contain documents that have not been identified or authenticated. (Dkt. #84).

Plaintiffs argue that they have raised genuine issues of material fact, and therefore, summary judgment is not appropriate. (Dkt. #72).

For the reasons set forth below, the Court agrees in part with plaintiff, and finds that defendants' motion should be GRANTED IN PART and DENIED IN PART.

II. DISCUSSION.

A. Background

In this lawsuit, plaintiffs, one former and one current employee of the Washington State Ferry ("WSF") system, claim that they were either fired or disciplined for speaking adversely against Special Projects undertaken by management. The claims by each plaintiff are discussed separately below.

Plaintiff Musselman was an employee of WSF for 20 years before being terminated in 2002. He primarily worked as an oiler. Between June of 2002 and August of 2002, Musselman apparently heard that defendant Broxon, one of Musselman's managers, was involved in a Special Project pertaining to lube oil used in the ferry engines. Musselman believed that the study was a waste of public funds, and began questioning co-workers about the project, and making comments that the project was a waste of money. Musselman alleges that after defendant Allen, another WSF manager,

heard him asking such questions, Allen began harassing him at work. Musselman also apparently heard from a co-worker that Allen said he wanted to fire Musselman for asking questions. Musselman also alleges that Allen tried to discredit him among the union members, calling him a "crazy Vietnam vet," and other derogatory names.

During the same time period, defendant Nitchman, a senior manager at WSF, brought discipline charges against Musselman. Musselman alleges these charges were brought as retaliation for speaking out against the Special Project. Defendant Nitchman claims that the charges were brought against Musselman as a result of a prior disciplinary hearing that occurred before Musselman began questioning the Special Project. Musselman was terminated on or about October 25, 2002.

Musselman was subsequently informed by the union that they would not represent him in a grievance procedure. Allen, Nitchman and Broxon were all senior union members at that time, as well as WSF managers. It appears from the record that the six-month union grievance procedure expired, and Musselman did not make a grievance. However, Musselman submitted an unfair labor practice complaint to the Washington State Marine Employees Commission ("MEC"). The MEC apparently told Musselman it would only hear his complaint if he removed the claim that the WSF managers were also senior members of the union. Musselman determined that pursuing any claim with the MEC would be futile, and declined to pursue the complaint. He then submitted a tort claim form to the State of Washington, and

subsequently filed this lawsuit.

Plaintiff Newmon was hired as an oiler by WSF in December of 2000. At some point, Newmon also learned of defendant Broxon's lube oil Special Project, and commented that the study appeared to be a waste of public funds because a similar study had already been completed by the oil companies and engine manufacturers. Newmon also questioned various co-workers about how the study was being conducted. Broxon learned that Newmon had been asking questions and allegedly assigned him to poor work assignments as a result.

Newmon alleges that Broxon also threatened him, stating that he should not speak against the Special Project because "things can happen to people, things can happen to their family, and their house can get burned down, because it is easy to find out where someone lives." Broxon also apparently told Newmon about other WSF employees that had questioned Special Projects, who had been demoted or injured as a result.

Newmon alleges that one day when he was being threatened, he decided he could no longer work with Broxon because he feared for his safety, so he requested a replacement worker for his shift, and, when that replacement arrived, he left the ferry. Broxon then apparently contacted defendant Nitchman, who charged Newmon with leaving his post and being disrespectful to his supervisor. Newmon alleges that these charges were brought in retaliation for speaking against the Special Project. Defendants claim that Newmon's discipline resulted from failing to finish his shift, and walking away from his job.

Newmon then contacted the Washington State Patrol ("WSP") about the threats. The WSP apparently informed him that he should speak with his union. Newmon determined that contacting his union would be futile since his managers were also senior members. The WSF staff chief apparently made a cursory investigation of the incident, and Broxon admitted to making a statement to Newmon about a different employee who had questioned Special Projects. Newmon subsequently participated in two disciplinary hearings, and eventually was suspended for two weeks without pay, and given an adverse employment letter. Newmon then filed a complaint with the Washington State Human Rights Commission. He requested a right to sue letter, which was granted by the Commission. Newmon then submitted a tort claim form to the State of Washington, followed by this lawsuit. Newmon remains an employee of WSF.

In their amended complaint, plaintiffs have also presented facts related to a pattern and practice of retaliation against other employees who had previously spoken against Special Projects, which resulted in harassment and false adverse employment complaints.

Plaintiffs have alleged seven causes of action, including violation of their right to free speech pursuant to 42 U.S.C. § 1983, violation of procedural due process based on structural bias pursuant to 42 U.S.C. § 1983, negligent infliction of emotional distress under Washington State common law, Washington State common law outrage, violations of Washington State's discrimination statute, wrongful discharge under Washington State common law, and

breach of contract under Washington State contract law. They request an award and damages in an amount to be determined by the Court.

On December 2, 2004, defendants moved for summary judgment based on qualified immunity. (Dkt. #19). The Court declined to grant summary judgment, finding that plaintiffs had engaged in constitutionally-protected speech, that WSF's interests had not outweighed Newmon's or Musselman's interest in expressing themselves, that defendants were on fair notice that plaintiffs' speech was constitutionally protected and the law was clearly established at the time of plaintiffs' conduct, that defendants' actions were not objectively reasonable, an therefore, qualified immunity does not apply as a defense in this case. (Dkt. #42).

Defendants have now separately moved for summary judgment in favor of all of the defendants, arguing that plaintiff has failed to produce any evidence during discovery, including witnesses, testimony, or physical evidence, that would raise any genuine issue of material fact requiring a trial in this case.

B. Summary Judgment Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Court must draw all reasonable

inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Genuine factual issues are those for which the evidence is such that "a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Material facts are those which might affect the outcome of the suit under governing law. *See id.* In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *O'Melveny & Meyers*, 969 F.2d at 747).

C. Motion to Strike Affidavits Under Local Rule 7(g)

As a threshold matter, the Court first addresses defendant's request to strike the affidavits of Marable, Newmon, Stell, Kuykendall and Hart, which were submitted in support of plaintiffs' response to the instant motion. (*See* Dkt. #84 at 2). Defendant argues that the affidavits in question do not meet the criteria set forth in Rule 56(e) of the

Federal Rules of Civil Procedure, which states that affidavits in support of, or opposition to, summary judgment "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e).

The Ninth Circuit Court of Appeals has often rejected statements contained in affidavits that are based on information and belief, rather than on personal knowledge. *See, e.g., Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993). Likewise, courts have determined that where it is not self-evident "from his job title or the activities which he describes in the affidavit" an affiant is not competent to testify to the matters stated within his affidavit, and striking such statements is appropriate. *See, e.g., Ramada Franchise Systems, Inc. v. Tresprop, Ltd.*, 75 F. Supp.2d 1205, 1209 (D. Kan. 1999). The Court has reviewed the affidavits and declarations at issue in this case, and finds as follows:

1. Mr. Newmon's Affidavit

In his affidavit, Mr. Newmon has not sworn that the statements contained therein are based on personal knowledge. Rather, many of his statements begin with the qualifier "I believe." Accordingly, those sentences, contained in paragraph numbers 3, 5, 8, 14, 16 and 17, are hereby STRICKEN, and the Court will not consider the statements when making its decision below. In addition, it is not evident from

Mr. Newmon's job description as an oiler aboard the Walla Walla, or from the activities which he describes, that he is competent to testify to Mr. Broxon's employment status or special projects work, or to Mr. Kathlean's employment aboard the Walla Walla. Accordingly, the Court also STRIKES the second sentence of paragraph 2, the first sentence of paragraph 7, and paragraphs 3, 5 and 8 in their entirety. The remainder of Mr. Newmon's affidavit appears to be based on his personal knowledge of, or involvement in, the activity he is describing, and will not be stricken.

2. Mr. Stell's Declaration

The majority of Mr. Stell's declaration appears to be based on his personal knowledge of, or involvement in, the activity he is describing, and will not be stricken. However, the Court will STRIKE the last sentence of paragraph 4, which is based only on Mr. Stell's "belief."

3. Mr. Kuykendall's Declaration

The majority of Mr. Kuykendall's declaration appears to be based on his personal knowledge of, or involvement in, the activity he is describing, and will not be stricken. However, the Court will STRIKE the last sentence of paragraph 4, which is based only on Mr. Kuykendall's "belief."

4. Mr. Marable's Declaration

Much of Mr. Marable's declaration is based on

"anecdotal evidence," or statements "heard" from other persons. It is not evident from Mr. Marable's job description as a chief, or from the activities which he describes, that he is competent to testify to much of the evidence he attempts to introduce with those statements. Moreover, a substantial portion of Mr. Marable's declaration is based on inadmissible hearsay. Accordingly, the Court STRIKES all of paragraph 3 except for the first sentence, those portions of paragraph 6 that pertain to Nitchman's actions and the Oil Eater 99, sentence one of paragraph 8, sentence one of paragraph 12, and paragraphs 4, 10, 13, 14 and 15 in their entirety.

5. Mr. Hart's Declaration

Mr. Hart's declaration is made in his capacity as plaintiffs' attorney in this case, and presents several documents as evidence for this Court's consideration. Mr. Hart states, under the penalty of perjury, that each document is a true and correct copy. It is not clear from the declaration whether the statements are based on personal knowledge; however, many of the documents are those created by Mr. Hart, or submitted to this Court in their original forms by Mr. Hart. (*See* Exs. 1, 2, 3 and 8). In addition, Mr. Hart has submitted copies of documents he received in response to his own discovery requests. (*See* Exs. 4, 5 and 6). Accordingly, the paragraphs related to those exhibits will not be stricken. However, it appears that there are several documents to which it is not evident from Mr. Hart's affidavit that he is competent to testify. Accordingly, paragraphs 7, 8 and 10, along with the corresponding

Exs. 6, 7 and 9, shall be STRICKEN in their entirety. *See American Rock Salt Co., LLC v. Norfolk Southern*, 180 F. Supp.2d 420, 423 (W.D.N.Y. 2001) (explaining that an attorney's affidavit that is not based on personal knowledge carries no weight and should be disregarded); *Foster v. Allied Signal, Inc.*, 98 F. Supp.2d 1261, 1265 (D. Kan. 2000) (striking an attorney affidavit that contained hearsay statements and unauthenticated documents).

D. Alleged § 1983 Violations

Plaintiffs first allege that defendant Nitchman violated their civil rights under 42 U.S.C. § 1983 by acting under "a policy, practice, or custom of harassing, threatening, and subjecting to adverse employment actions employees who stated that one or more of the Special Projects are a waste of time." (Dkt. #63 at 11). Specifically, plaintiffs allege that defendant Nitchman:

> (1) . . . directly participated in the violations of Plaintiffs' rights, (2) . . . failed to remedy the Plaintiffs' rights after learning of them, (3) . . . created or maintained the policies or customs under which unconstitutional practices occurred, (4) . . . exercised gross negligence in supervising Broxon and Allen, and (5) . . . exhibited deliberate indifference by failing to act on information indicating that unconstitutional violations were occurring.

(Dkt. #63 at 11-12). Plaintiffs further allege that defendant Nitchman:

> violated . . . Plaintiffs' procedural due process rights under the Fourteenth Amendment by acting as decisionmaker for bringing the charges against Plaintiffs and acting as the decisionmaker at the disciplinary hearings of retaliatory disciplinary charges brought after Plaintiffs stated one or more Special Projects appeared to be a waste of funds. Nitchman receives direct and/or indirect benefits for approving and/or not objecting to the Special Projects; and/or manages the Special Projects. Nitchman had a direct, personal, and substantial pecuniary interest in the proceedings. Nitchman also had a strong motive to rule in a way that would aid the institution because of his institutional responsibilities.

(Dkt. #63 at 12-13).

Defendant argues that plaintiffs are unable to show that he was personally involved with any of the alleged constitutional deprivations, or that he knew any were occurring, and therefore urges the Court to dismiss these claims against him.

In order to maintain a civil rights action under 42 U.S.C. § 1983 against a state official, plaintiffs must demonstrate that such official played an affirmative part in the alleged deprivation of constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Tribble v. Gardner*, 860 F.2d 321, 327 (9th Cir. 1998); *King v. Atiyeh*, 814 F.2d 565 (9th Cir. 1987). A defendant may be found to have been "personally involved" in a constitutional deprivation

if he or she: (1) directly participated in the infraction; (2) failed to remedy a wrong after learning of the violation; (3) created or allowed a policy to continue under which the violations occurred; or (4) was grossly negligent in managing the subordinates who caused the unlawful condition or event. *Williams v. Smith*, 781 F.2d 319 (2nd Cir. 1986).

In the instant case, Nitchman's direct involvement with plaintiffs appears to be limited to conducting the discipline hearings, which plaintiffs allege were held in retaliation for questioning defendant Broxon's lube oil Special Project. Defendant Nitchman now argues, as he did previously, that the evidence demonstrates that employment decisions with respect to both Newmon and Musselman were taken not for retaliatory reasons, but for other valid purposes. Specifically, in Musselman's case, defendant Nitchman argues that Musselman's employment was terminated as a result of a disciplinary proceeding that took place prior to his speaking out against Special Projects. In Newmon's case, defendant Nitchman argues that Newmon's disciplinary action resulted from walking off the job and his failure to finish his shift.

However, the Court rejected this argument in its prior order on defendants' motion for summary judgment. (*See* Dkt. #42 at 11-12). As the Ninth Circuit Court of Appeals explained in *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), proof of motive is a question of fact that should be left for trial. "It is possible that they will be able to show at trial that the adverse acts [plaintiff] alleges were not taken in retaliation for his constitutionally protected speech. However, 'as with proof of motive in other

contexts, this element of a First Amendment retaliation suit . . . involves questions of fact that normally should be left for trial.'" *Ceballos*, 361 F.3d at 1181 (citations omitted). Accordingly, the Court agrees with plaintiff that Cause of Action One should not be dismissed.

As for plaintiffs' Cause of Action Two, the Court is not convinced that plaintiffs have raised any genuine issue of material fact with regard to defendant Nitchman's actions. Plaintiffs essentially allege that defendant Nitchman violated their civil rights during the disciplinary hearings he conducted by his receipt of direct or indirect benefits from the Special Projects, and because of his direct, personal and substantial pecuniary interests in the disciplinary proceedings. Plaintiffs argue that defendant Nitchman had both a clear structural bias and personal interest and a structural bias and institutional interest in the outcome of the disciplinary hearings. Defendant Nitchman argues that plaintiffs have produced no evidence that he was influenced during the proceedings by anything other than the evidence that he heard. The Court agrees.

While plaintiffs have produced a number of documents purporting to demonstrate defendant Nitchman's biases, many of those documents have been stricken, *supra*, because plaintiffs' attorney does not have the requisite personal knowledge to testify to the validity of those documents, and many other of the documents are simply irrelevant to plaintiffs' arguments. For example, whether defendant Nitchman was responsible for the accounting for his department, whether he was a

member of the union and was eligible for Special Project funds, and whether he was interviewed by the Bremerton Sun, do not in and of themselves prove personal or institutional bias. Finally, the allegation that defendant Nitchman has entered into quid pro quo agreements with employees on Special Projects is mere speculation at this point, and many of the statements in support of that allegation have also been stricken. Accordingly, the Court finds that plaintiffs may not maintain a claim of structural bias against defendant Nitchman.

E. Negligent Infliction of Emotional Distress

In their Third Cause of Action, plaintiffs assert the state law claim of negligent infliction of emotional distress against defendant Nitchman. In order to succeed on this claim, plaintiffs must prove objective symptoms of emotional distress, and they must assert a separate factual basis for their claim than that of the retaliation claim. In *Haubry v. Snow*, 106 Wn. App. 666 (2001), the Washington State Court of Appeals laid out the standard for a negligent infliction of emotional distress claim, explaining that:

> [a]n employee may recover damages for emotional distress in an employment context, but only if the factual basis for the claim is distinct from the factual basis for the discrimination claim. Here, there is no separate compensable claim because the factual basis for the emotion distress claim is

> the same as the sexual harassment or discrimination claim. . . . A claim for the negligent infliction of emotional distress also requires that Haubry establish that the emotional distress is manifested by objective symptoms. To satisfy the objective symptomatology requirement established in the case of *Hunsley v. Giard*, Haubry's emotional distress must be susceptible to medical diagnosis and proved through medical evidence. *Haubry*, 106 Wn. App. at 678.

In the instant case, the factual basis of plaintiffs' negligent infliction of emotional distress claim is the same as the factual basis for their retaliation claim - namely that defendant Nitchman took adverse employment actions as a result of plaintiffs' inquiries in the lube oil special project. (*See* Dkt. #72 at 18). Moreover, plaintiffs have produced no medical evidence of objective symptoms of such distress. Plaintiff Musselman has provided no proof that he obtained medical or other treatment, nor has he provided any diagnosis upon which he bases his claim. Plaintiff Newmon has produced only one medical report and a medical bill, which have not been authenticated. Therefore, the Court finds that neither plaintiff has raised a genuine issue of material fact in regard to their claim, and summary judgment in favor of defendant is appropriate.

F. Alleged RCW 49.60 Violations

Plaintiffs' Fifth Cause of Action asserts violations by defendant Nitchman under RCW 49.60,

Washington State's law against discrimination. Specifically, plaintiffs allege that defendant Nitchman violated RCW 49.60.210(2). That statute states in relevant part, "[i]t is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW." RCW 49.60.210(2). RCW 42.40.020 defines a whistleblower as:

> . . . an employee who in good faith reports alleged improper governmental action to the auditor, initiating as investigation under RCW 42.40.040. For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means: (a) An employee who in good faith provides information to the auditor in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported improper governmental action to the auditor or to have provided information to the auditor in connection with an investigation under RCW 42.40.040 but who, in fact, has not reported such action or provided such information; or (b) an employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

RCW 42.40.020(8).

Defendant Nitchman argues that plaintiffs' claim should be dismissed because they have provided no evidence that they are statutory whistleblowers. It appears that, in particular, defendant Nitchman believes plaintiffs have not provided evidence that they reported any information to the office of the State Auditor. The Court finds this argument misguided in regard to plaintiff Musselman. Plaintiff Musselman has declared that he made several telephone calls to the Auditor's office regarding Special Projects. Indeed, the Court took note of this fact in its prior order denying summary judgment. (Dkt. #42 at 9). However, the Court agrees that Newmon has not proven that he is a statutory whistleblower. Plaintiff Newmon merely alleges that because defendant Broxon told him to stop talking about the Special Projects, he is an employee believed to have made reports to the State Auditor. There is nothing in defendant Broxon's statement that even hints he believed plaintiff Newmon had been speaking to the auditor. Therefore, the Court finds that plaintiff Newmon's whistleblower claim must be dismissed.

G. Wrongful Discharge

Plaintiffs' Cause of Action Six alleges that defendant Nitchman discharged plaintiff Musselman in violation of public policy and without just cause. Defendant Nitchman argues that this claim should be dismissed because plaintiff Musselman is not a statutorily defined whistleblower under Washington State law. The Court has already rejected that argument, *supra*, and therefore finds that Cause of

Action Six should not be dismissed.

H. Breach of Contract

Finally, plaintiffs' Cause of Action Seven asserts a breach of contract claim against defendant Nitchman, alleging that the plaintiffs were beneficiaries of a collective bargaining agreement between the WSF and the Marine Engineers Beneficial Association ("MEBA"), the union to which plaintiffs belong, and Nitchman breached that agreement by allowing members of the WSF management to maintain their active membership in the MEBA.

Defendant Nitchman argues that the contract in question was not formed between himself, individually, and the MEBA. Rather, the contract was formed between the WSF, who is not a party to this litigation, and the MEBA. Thus, there is no duty under the contract due to plaintiffs by defendant Nitchman in his individual capacity.

Plaintiff answers that defendant Nitchman materially breached the collective bargaining agreement for his own personal benefit, and that he violated the duty of good faith and fair dealing by taking actions for his individual benefit and by causing the MEBA and WSF to protect members of management who were MEBA members and who were involved in Special Projects. The Court is not persuaded. Plaintiffs present no evidence in support of these bare and conclusory allegations. Moreover, plaintiffs have sued defendant Nitchman only in his individual capacity, not in his capacity as the Director of Fleet and Maintenance Preservation. As

noted above, defendant Nitchman did not form the contract in question with the MEBA in his individual capacity. Therefore, the Court finds that plaintiffs may not maintain their breach of contract claim against defendant Nitchman.

III. CONCLUSION

Having reviewed defendant Nitchman's second motion for summary judgment (Dkt. #67), plaintiffs' opposition (Dkt. #72), defendant's reply (Dkt. #84), the declarations and evidence in support of those briefs, and the remainder of the record, the Court hereby GRANTS IN PART and DENIES IN PART defendant's motion for summary judgment (Dkt. #67) as follows:

(1) Cause of Action One, which asserts a § 1983 claim of retaliation based on protected speech under the First Amendment, remains pending against defendant Nitchman for the reasons set forth above;
(2) Cause of Action Two, which asserts a § 1983 claim of employment discrimination based on structural bias, is hereby DISMISSED against defendant Nitchman for the reasons set forth above;
(3) Cause of Action Three, which asserts a claim for negligent infliction of emotion distress, is hereby DISMISSED against defendant Nitchman for the reasons set forth above;
(4) Cause of Action Five, which asserts a retaliation claim for whistleblowing against defendant Nitchman, is DISMISSED IN PART, in that plaintiff Newmon may not assert such claim, but plaintiff Musselman's claim remains pending for the reasons

set forth above;

(5) Cause of Action Six, which asserts a claim of wrongful discharge of plaintiff Musselman, remains pending against defendant Nitchman for the reasons set forth above;

(6) Cause of Action Seven, which asserts a claim for breach of contract, is DISMISSED against defendant Nitchman for the reasons set forth above;

The Clerk shall forward a copy of this Memorandum Order to all counsel of record.

DATED this 5th day of July, 2005.

s/ RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

EXHIBIT I

Trial Transcript
Hon. Ricardo S. Martinez, District Judge
United State District Court
Seattle, Washington
November 15, 2005

PROCEEDINGS:

THE COURT: Counsel, before we bring the jury out, as indicated previously the Court has now had an opportunity to review the reply of Mr. Hart regarding the defense motions for a directed verdict. As indicated previously, the focus of the Court was on the whistleblowing claim of Mr. Musselman, and in order to succeed on the whistleblowing claim, whether it's based on the statutory scheme or the common law, there are two elements that need to be shown. And the plaintiff needs to prove, one, that he's a whistleblower -- let's leave that aside for the moment -- and, two, that his complaints of alleged improper and governmental action or behavior were a substantial motivating factor in the termination of his employment in this particular case. Element number two is the element in this case that this court finds Mr. Musselman has failed to prove. There is a total failure of proof -- and we've heard all the plaintiff's evidence at this point in time -- to show that any of the three named defendants had any knowledge that Mr. Musselman was a whistleblower in this case. The one exhibit that identifies witness A, witness B, and the testimony by the state auditor did not ever identify who those individuals were.

There's been no testimony to link up Mr. Musselman as being either witness A or witness B. There's no evidence to show that any of the three defendants even believed that Mr. Musselman was the potential whistleblower. Therefore there is really no way, based on the evidence before this jury, that any reasonable jury could find that Mr. Musselman's whistleblowing activities were a substantial motivating factor in his termination. The defense motion for a directed verdict on Mr. Musselman's whistleblowing claim will be granted.

EXHIBIT J

DEFENDANT'S
EXHIBIT
CASE NO. C04-984
EXHIBIT NO. 141

NAME ISSUE/REQUEST/ACTION/STATUS
A LIST – INACTIVE
ACCOMMODATION RECORDS

Musselman, Lance

03/26/89: Lance was told his job performance below standards & he was not longer wanted on that watch. He tends to "forget" even standard practices on watch. Lance ended up threatening the CE, R. Schaffer
02/01/97: Ltr. from Dr. Muller - Lance continues in psychiatric treatment for depression & anxiety. Not yet able to return to work and function effectively-still needs 1-2 months off.
06/06/97: Ltr. from Dr. B. Muller - Lance still not fit to return to duties.
06/20/89: Note from M. Liuska-R. Keene called in about Lance. Walking time bomb. Seems to be having trouble at home. Would like to see Lance get medical help.
07/27, 27 & 28/97: Rambling econos from Lance to Ben Davis.
10/08/89: More complaints about work performance, attendance and exhibiting extreme anxiety.
10/10/89: Lance evaluated by Dr. Perkins. Opinion is that Lance is suffering from depression in

combination of his work dissatisfaction & pressures of home situation. Causes gastrointestinal & insomnia as well as paranoia. Recommends psychiatric eval. And treatment program for depression.
01/25/90: Dr recommends LOA for medical reasons. LOA granted from 02/07/90 - 08/06/90 (will return early if FFD).
07/15/90: Lance returned from LOA & assigned to E. State-has now transferred to WALLA2.
07/27/90: Continuation of LOA to approx 11/1/90 in order to receive medical treatment.
11/01/90: Lance returned from LOA, transferred to KITTITAS.
05/06/96: Dr. report says Lance should be off work to recover from extreme stress and depression.
10/29/96: Dr. reports says Lance NOT ready to return to work. Please extend LOA by 3 mos.
01/31/97: Dr. report says Lance still experiencing high level of anxiety. Possibly ready to return to work about 03/01/97.
04/16/97: E-mail from K. Nichols saying Lance called wanting her to pay MEBA training so he could get books to study. Told her he might be able to RTW in 2 or 3 months.
04/18/97: Dr's letter requesting extension of leave until 07/01/97.
07/18/97: Dr. Manning & Lance's Dr., Dr. Bart Muller, both concur Lance ready to RTW.
08/07/97: Lance repeatedly calling K. Nichols & his insurance specialist in short periods of time- making many phone calls, exhibiting confusion & anxiety about how to fill out forms. Dispatch getting

numerous messages that are increasingly aggressive/angry.
10/31/97: E-mail from M. Nitchman. Wants medical done on Lance before going into Eagle Harbor. He is making bizarre phone calls to his dog and acting strangely. Believes he's UFFD.
10/01/98: Lance's Dr. wrote that he has suffered a relapse of major depression & panic disorders. Has requested LOA for 2-3 months.
12/24/98: Rec'd note from Dr. Muller, Pac Med Center dated 12/17/98; Lance not yet ready to return to work. His expected return is mid-February, 1999. Dispatch notified.
Note from Dave - "Off from 10/01/98 to ???"
03/25/99: Evaluation from Dr. Juergens; RTW, no restrictions, effective 03/29/99
CLOSED
09/26/00: Dr note; cannot RTW til 01/01/01; prob w/leg; is schedule for IME w/psy & MD 11/07/00.
12/27/00: Report from Dr. Juergens; he feels Lance able to RTW.
01/11/01: EJF from dr ??; Lance cannot RTW as yet; tibia and tibula fractures not healed; leg still swollen & painfull; plan on back approx 03/01/01.
03/16/01: Dr. report states Lance's estimated RTW is 06/15/01.

11/13/2003
ACCOM INACTIVE with page breaks
CLOSED*-See Inactive File for full background
COPY of DATA Recorded Prior to 2003

EXHIBIT K

United States Constitution, Amend. I:

Congress shall make no law ... abridging the freedom of speech ...

United States Constitution, Amend. XIV § 1:

... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

R.C.W. § 42.40.010

Policy

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

R.C.W. § 42.40.020

Definitions

As used in this chapter, the terms defined in this section shall have the meanings indicated unless the context clearly requires otherwise.

(1) "Auditor" means the office of the state auditor.

(2) "Employee" means any individual employed or holding office in any department or agency of state government.

(3) "Good faith" means a reasonable basis in fact for the communication. "Good faith" is lacking when the employee knows or reasonably ought to know that the report is malicious, false, or frivolous.

(4) "Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(5)(a) "Improper governmental action" means any action by an employee undertaken in the performance of the employee's official duties: (i) Which is [a] gross waste of public funds or resources as defined in this section; (ii) Which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature; or (iii) Which is of substantial and specific danger to the public health or safety.

(b) "Improper governmental action" does not include personnel actions, for which other remedies exist, including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the state civil service law, alleged labor agreement violations, reprimands, claims of discriminatory treatment, or any action which may be taken under chapter 41.06 RCW, or other disciplinary action except as provided in RCW 42.40.030.

(6) "Substantial and specific danger" means a risk of serious injury, illness, peril, or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

(7) "Use of official authority or influence" includes taking, directing others to take, recommending,

processing, or approving any personnel action such as an appointment, promotion, transfer, assignment, reassignment, reinstatement, restoration, reemployment, performance evaluation, or any adverse action under chapter 41.06 RCW, or other disciplinary action.

(8) "Whistleblower" means an employee who in good faith reports alleged improper governmental action to the auditor, initiating an investigation under RCW 42.40.040. For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means: (a) An employee who in good faith provides information to the auditor in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported asserted improper governmental action to the auditor or to have provided information to the auditor in connection with an investigation under RCW 42.40.040 but who, in fact, has not reported such action or provided such information; or (b) an employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

R.C.W. § 42.40.050

Retaliatory action against whistleblower – Remedies

(1) Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to

workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW. For the purpose of this section "reprisal or retaliatory action" means but is not limited to any of the following: (a) Denial of adequate staff to perform duties; (b) Frequent staff changes; (c) Frequent and undesirable office changes; (d) Refusal to assign meaningful work; (e) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations; (f) Demotion; (g) Reduction in pay; (h) Denial of promotion; (i) Suspension; (j) Dismissal; (k) Denial of employment; (l) A supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower; and (m) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish.

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower.

(3) Nothing in this section prohibits an agency from making any decision exercising its authority to terminate, suspend, or discipline an employee who engages in workplace reprisal or retaliatory action against a whistleblower. However, the agency also shall implement any order under chapter 49.60 RCW (other than an order of suspension if the agency has terminated the retaliator).